CONSIDERATIONS FOR EPA REVOCATION OF TEXAS MSS SIP CALL

On June 12, 2015, the Environmental Protection Agency ("EPA") published a final rule calling for the revision of the maintenance, startup and shutdown ("MSS") provisions in the Texas State Implementation Plan, along with those of 35 other states (the "SIP Call").[1] The SIP Call marked a reversal of EPA's prior approval of the Texas provisions, which had been upheld by the Fifth Circuit.[2]

On March 15, 2017, the Texas Commission on Environmental Quality ("TCEQ") submitted to EPA a petition for reconsideration of the SIP Call. Key among the grounds for Texas's petition was EPA's fundamental misunderstanding of the relevant provisions of the Texas SIP, which became apparent from EPA's appellate briefing well after the close of comment. Texas was the sole petitioner for reconsideration.

On April 18, 2017, citing the Texas petition, EPA asked the D.C. Circuit to stay the appeal the SIP Call to allow EPA time to reconsider it. The environmental NGO petitioners objected, asserting that they are fully capable of defending the SIP Call based on the "purely legal" nature of the issues before the court. The D.C. Circuit granted EPA's motion and placed the case in abeyance on April 24, 2017.

Now, EPA is evaluating whether to reconsider the SIP Call. For the reasons outlined below, EPA has the authority to revoke the SIP Call as to Texas first. Rather than relying solely on a change of view on the "purely legal" issues now before the D.C. Circuit, EPA's Texas action could be based on a robust factual record. That record would be framed on the unique and integral role that the Texas MSS provisions play in the Texas SIP and on their real-world application by district courts in Texas. Any challenge to EPA's action as to Texas must be filed in the Fifth Circuit, which has already resolved the relevant issues. EPA could preserve the D.C. Circuit abeyance as it works through the other states' unique submittals (which were in many cases voluntary withdrawals).

I. EPA should Revoke the MSS SIP Call as to Texas and Reaffirm its Prior Interpretation of the Permissibility of the Texas Affirmative Defense.

EPA reversed its position regarding the permissibility of affirmative defenses in a SIP following the D.C. Circuit's 2014 decision in *NRDC v. EPA*.[3] The *NRDC* court held that EPA did not have authority to establish an affirmative defense to penalties for violations of Section 112 of the Clean Air Act.[4] EPA extended the *NRDC* reasoning (but not holding) to SIPs promulgated under Section 110. Based upon this interpretation, EPA found that the Texas SIP was "substantially inadequate" and called for its revision.

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[1] 80 Fed. Reg. 33,839 (June 12, 2015). Petitions for review of the Final Rule in the D.C. Circuit in July 2015 have been consolidated under *Environmental Committee of the Florida Electric Power Coordinating Group v. EPA*, No. 15-1239 (D.C. Cir., filed 7/27/2015) (*"Florida Electric"*).

[2] *Luminant Generation Co. LLC v. EPA*, 714 F.3d 841 (5th Cir. 2013).

[3] 749 F.3d 1055 (D.C. Cir. 2014).

[4] *NRDC* at 1063.

For the reasons discussed below—and as outlined in TCEQ's petition for reconsideration—EPA's determination that the Texas SIP is "substantially inadequate" is based upon a fundamental misunderstanding the Texas MSS provisions and a misapplication of the *NRDC* decision to the Texas SIP. Accordingly, EPA should grant TCEQ's petition for reconsideration of the Final Rule and publish, through notice-and-comment rulemaking, a revocation of the SIP Call as to Texas.

a. EPA's Misunderstanding of the Texas Provisions Calls for Reconsideration

In EPA's Final Answering Brief in *Florida Electric*—then *Walter Coke, Inc. v. EPA*—EPA stated that "the affirmative defense is a relatively new and narrow addition to the Texas SIP" and that "[t]he Texas SIP existed for decades without this affirmative defense."[5] As discussed below, this interpretation reflects a fundamental misunderstanding of the long-standing and integral role the MSS provisions have played in Texas's overall emission control strategy since its inception in 1972.

Ensuring that EPA has appropriately characterized the Texas provisions is of central relevance to the outcome of the SIP Call. However, as EPA's mischaracterization of the affirmative defense was not a part of the proposal or final action, the grounds for an objection did not appear until after the period for public comment. Under these circumstances, and pursuant to section 307(d)(7)(B) of the Clean Air Act, "the Administrator *shall* convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed." Accordingly, EPA must grant TCEQ's petition for reconsideration and reevaluate the permissibility of the Texas affirmative defense within the appropriate context of the Texas SIP.

b. EPA's Mischaracterization the Texas Affirmative Defense Calls for Revocation of the Texas SIP Call

As explained by TCEQ's petition for reconsideration, submitted to EPA in March of 2017, the Texas MSS affirmative defense is a key component of the state's clean air strategy and has existed, in some form, as far back as the original Texas SIP of 1972. Over the course of four decades, these provisions have become a key part of a comprehensive and effective strategy to control emissions.

For example, the Texas SIP originally established more stringent permit and rule-based emission limits on the basis that unavoidable MSS emissions could be addressed separately. Almost 45 years later, the Texas affirmative defense is now cross-referenced in a number of provisions of the Texas Administrative Code.[6] It is not possible to remove or replace these discrete MSS provisions or cross-references from the Texas SIP without dramatically changing the SIP as a whole.

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[5] Brief of Respondent EPA at 110, *Walter Coke, Inc. v. EPA*, No. 15-1166 (D.C. Cir., Oct. 28, 2016).

[6] *See, e.g.*, 30 Tex. Admin. Code §§ 117.145(a), 117.245(a), 117.345(a), 117.445(a), 117.1045(a), 117.1145(a), 117.1245(a), 117.1345(a), and 117.3045(a).

The significance of the affirmative defense to the Texas control strategy provides a rational basis for the revocation of the SIP Call as to Texas.

c. The Fifth Circuit Has Explicitly Considered and Approved the Texas Affirmative Defense as Permissible under the Clean Air Act

EPA misinterpreted the *NRDC* decision as holding that a SIP's affirmative defense provision impermissibly interferes with the Clean Air Act's grant of jurisdiction[7] to the district courts over violations of an applicable standard.[8] But the issue whether such provisions interfere with a court's jurisdiction was explicitly considered by the Fifth Circuit in a challenge to EPA's final rule approving the Texas SIP's inclusion of the MSS affirmative defense provisions.[9] In that case, a coalition of environmental organizations argued that the Texas affirmative defense impermissibly interfered with the Clean Air Act's provisions regarding the assessment of civil penalties.

In upholding EPA's approval of the affirmative defense, the Fifth Circuit explicitly rejected this jurisdictional argument. According to the court:

> The availability of the affirmative defense does not negate the district court's jurisdiction to assess civil penalties using the criteria outlined in section 7413(e), or the state permitting authority's power to recover civil penalties, it simply provides a defense, under narrowly defined circumstances, if and when penalties are assessed.[10]

Given this finding, the Fifth Circuit "conclude[d] that the EPA did not act arbitrarily or capriciously, contrary to law, or in excess of its statutory authority" in its approval of the Texas affirmative defense.[11]

d. District Courts Have Considered the Texas Affirmative Defense and Found it Did Not Interfere with Their Jurisdiction.

At least two separate district courts have considered the Texas affirmative defense following its approval by the Fifth Circuit in *Luminant*.[12] Neither court found the affirmative defense to be an impediment to its jurisdiction. Instead, these courts interpreted the affirmative defense as a permissible exercise of the state's broad discretion in choosing how to implement its emissions control programs. In other words, the affirmative defense acts as one component of the state's overall control strategy to establish the applicable standard by which the court judges an alleged violation. Understood as such, the courts applied the facts of the case to that standard and, where a violation was found, awarded the appropriate relief or penalty as outlined by

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[7] CAA §§ 113(b), 304(a).
[8] 80 Fed. Reg. 33,840, at 33,845-48.
[9] 75 Fed. Reg. 68,989 (Jan. 10, 2011).
[10] *Luminant Generation Co. LLC v. EPA*, 714 F.3d 841, 853 n.9 (5th Cir. 2013).
[11] *Id.* at 860.
[12] *Sierra Club v. Energy Future Holdings Corp.*, 2014 WL 2153913, at *12-19 (W.D. Tex. Mar. 2, 2014); *see also Env't Texas Citizen Lobby, Inc. v. ExxonMobil Corp.*, 2017 WL 2331679, at *22 (S.D. Tex. Apr. 26, 2017).

statute. Accordingly, EPA's fear that the Texas affirmative defense might restrain the district courts' jurisdiction turned out to be unfounded.

e. The Reasoning in *NRDC* Should not be Extended to State Implementation Plans under Section 110

According to EPA, "the reasoning of the court in [*NRDC*] indicates that the states, like the EPA, have no authority in SIP provisions to alter the jurisdiction of federal courts to assess penalties for violations of CAA requirements through affirmative defense provisions."[13] This interpretation fails to recognize that the *NRDC* court was only faced with determining whether EPA had the authority to determine the appropriateness of civil penalties through an affirmative defense in implementing its own technological standard-setting decisions under section 112 of the Clean Air Act.[14] Indeed, citing the Fifth Circuit's decision in *Luminant*, the D.C. Circuit explicitly withheld its judgment in *NRDC* on whether affirmative defenses were permissibly part of a SIP under section 110, a provision that affords states far greater flexibility to implement emissions limitations than section 112 affords.

The Clean Air Act only delegates to EPA the authority "to prescribe such regulations *as are necessary* to carry out [its] functions under this chapter."[15] States, on the other hand, are granted the authority to establish "enforceable limitations and other control measures, means, or techniques . . . as may be necessary *and appropriate*" and to "provide for the enforcement of [these] measures."[16] In interpreting this grant of authority, the Supreme Court has held that "so long as the ultimate effect of a State's choice of emissions limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emissions limitations it deems best suited to its particular situation."[17]

Given the above, the *NRDC* decision regarding EPA's authority under section 112 should not be extended to limit the states' authority to include such provisions in their SIPs under section 110.

II. EPA is not Foreclosed from Changing its Interpretation as to Affirmative Defenses under Section 110

Agencies are not foreclosed from reinterpreting their own policies, provided that the agency can put forth a reasonable explanation for the change in position. As held by the U.S. Supreme Court, "[an agency] need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates."[18]

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[13] 79 Fed. Reg. 55,920 at 55,929.
[14] *NRDC* at 1063.
[15] CAA §301(a)(1).
[16] CAA §110(a)(2).
[17] *Train v. NRDC*, 421 U.S. 60, 79 (1975).
[18] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

As discussed above, the decision in *NRDC* did not reach the permissibility of affirmative defenses in state SIPs under section 110. Furthermore, EPA's former concern that the affirmative defense impermissibly interferes with the district courts' jurisdiction have proven to be unfounded as to Texas. Instead, courts have found the Texas affirmative defense to be an appropriate exercise of the broad discretion granted to states to establish control strategies under section 110.

Accordingly, there are "good reasons" for EPA to reaffirm its prior interpretation of the Texas affirmative defense. Furthermore, the prior interpretation remains a permissible interpretation under the statute notwithstanding the *NRDC* decision. Therefore, an EPA action withdrawing the finding of "substantial inadequacy" as to the Texas SIP's affirmative defense provisions has a robust factual basis.

III. An EPA action to revoke the Final Rule as to the Texas affirmative defense would be reviewable in the Fifth Circuit.

Pursuant to CAA § 307(b)(1), venue for judicial review of an EPA action is based upon the geographic applicability or scope of the action. Specifically, nationally applicable actions may be filed only in the D.C. Circuit. Similarly, the D.C. Circuit is the exclusive venue for locally or regionally applicable rules for which EPA has both determined and published a finding of "nationwide scope or effect." In the absence of either an EPA determination or publication, the presumption is that a locally or regionally applicable action may only be filed in the United States Court of Appeals for the appropriate circuit.

As discussed below, an EPA action to revoke the SIP Call as to Texas only, and to affirm its prior approval of the Texas provisions, should be considered a locally or regionally applicable action. Furthermore, such an action would not satisfy the criteria of the "nationwide scope or effect" exception because it would be based on the particulars of the Texas provisions. Accordingly, judicial review of any such action would be in the Fifth Circuit.

a. An EPA Action Approving or Revision a SIP is a "Prototypical Locally or Regionally Applicable" Action.

Pursuant to the Clean Air Act, an EPA action specific to the Texas SIP would be considered a locally or regionally applicable rule for the purposes of determining judicial review. Section 307(b)(1) of the Act specifically enumerates §110—relating to the promulgation, adoption, and revision of SIPs—as a locally or regionally applicable action. Indeed, the D.C. Circuit has held that, "Under Section 307(b)(1), EPA's 'action in approving or promulgating any implementation plan' is the prototypical 'locally or regionally applicable' action that may be challenged only in the appropriate regional court of appeals."[19] Accordingly, unless EPA has determined and published a finding that the action has nationwide scope or effect, venue for judicial review of a Texas-specific action would lie in the Fifth Circuit.

b. EPA's Decision to Decline to Publish a Finding of "Nationwide Scope or Effect" Would be Subject to a Clear and Convincing Standard.

[19] *Am. Rd. & Transp. Builders Ass'n v. E.P.A.*, 705 F.3d 453, 455 (D.C. Cir. 2013)

As discussed above, an action applicable only to the Texas SIP (a "locally or regionally applicable action") would be presumptively reviewable in the Fifth Circuit. An exception to this presumption would exist, however, if "two conditions" are met.[20] Specifically, review would be appropriate in the D.C. Circuit if (1) the court concludes, after its own "independent inquiry," that the action by EPA was based on a determination of "nationwide scope and effect" and (2) EPA publishes its own finding that the action has "nationwide scope or effect."[21] If either of these two conditions is not met (for example, if EPA declines to make and publish a finding of "nationwide scope or effect"), then the exception does not apply and review is in the Fifth Circuit exclusively.

It has been EPA's position in litigation that its decision *to decline* to make a finding of "nationwide scope and effect" is unreviewable by the courts.[22] That position has not been accepted by the courts. In any case, the D.C. Circuit has said that, were it to review EPA's decision to decline to make the finding, that decision would likely be reviewed under the deferential "arbitrary and capricious" standard.[23]

In the case of an EPA action on the Texas affirmative defenses, it would not be arbitrary and capricious for EPA to decline to make a finding of "nationwide scope and effect." By way of illustration, petitioners in *American Road & Transp. Builders Ass'n v. EPA* ("*ARTBA*") sought review of an EPA action as to the California SIP in the D.C. Circuit, despite the absence of a published finding of "nationwide scope or effect." The petitioners argued that the action had nationwide scope and effect because "the SIP approval applies a broad regulation to a specific context and that it may set a precedent for future SIP proceedings."[24] According to the court,

> Although both of those statements may be factually accurate, neither characterization distinguishes this action from most other approvals of SIPs or SIP revisions—which, again, unequivocally fall in the "locally or regionally applicable" category. EPA's decision not to make a "determination of nationwide scope or effect" thus was not unreasonable.[25]

Here, as in *ARTBA*, an EPA action specific to the Texas SIP would "unequivocally" be considered a "locally or regionally applicable" action, even cast in the context of the broader SIP Call. Accordingly, a decision by EPA to decline to publish a determination of "nationwide scope or effect" is likely to be found reasonable, mandating review of the action in the Fifth Circuit.

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[20] *Texas v. EPA*, 829 F.3d 405, 419-21 (5th Cir. 2016).
[21] *Id.* at 421.
[22] *American Road & Transportation Builders Ass'n v. EPA*, 705 F.3d 453 (D.C. Cir. 2013) ("*ARTBA*") ("EPA argues that a court cannot review EPA's decision to decline to make a nationwide scope or effect determination. But we need not cross that bridge in this case.").
[23] *ARTBA*, 705 F.3d at 456.
[24] *Id.*.
[25] *Id.*